STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINA SMITH,

Plaintiff-Appellee,

v

DANBURY PARK MANOR, DENNIS J. VARIAN, SUGARBERRY APARTMENTS CORP., and DPM ASSOCIATES LIMITED PARTNERSHIP,

Defendants-Appellants.

UNPUBLISHED
June 23, 2000

No. 207152
Washtenaw Circuit Court
LC No. 95-002320 NO

Before: Gage, P.J., and White and Markey, JJ.

MARKEY, J. (concurring in part and dissenting in part).

Defendants appeal by right from a circuit court judgment, following a jury trial, awarding plaintiff $198,025.23 against defendants. Although our reasoning may differ, Judge White and I agree on the resolution of all issues except for those involving the admission of testimony and records regarding inadequate maintenance and HUD violations. On those issues, she agrees with Judge Gage, thereby requiring a remand for a new trial. I, on the other hand, would affirm on all issues.

Plaintiff commenced this action, alleging negligence and breach of contract, after she was robbed and sexually assaulted by an assailant who broke into her apartment through a basement window.

I

Defendants first claim that the trial court erred in denying their motion for summary disposition under MCR 2.116(C)(8) and (C)(10). *Paul v Lee*, 455 Mich 204, 210-211; 568 NW2d 510 (1997). Relying on *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988), defendants contend that they did not have a duty to protect plaintiff from an unforeseen criminal attack. We conclude that defendant's reliance on *Williams* is misplaced. As this Court observed in *Stanley v Town Square Coop*, 203 Mich App 143, 148-151; 512 NW2d 51 (1993), *Williams* did not alter the

duty that landlords owe to their tenants and invitees to use reasonable care to protect tenants and their guests from *foreseeable* criminal activities.

Here, plaintiff alleged that defendants, the owners of the apartment complex, knew that the basement windows in the complex were unsafe and a means by which other apartments in the complex had been illegally entered. Plaintiff alleged that defendants installed basement windows that did not lock; defendants performed work on the windows before the attack but failed to adequately repair and secure the windows; and defendants failed to respond to prior tenant complaints about the inadequacy and unsafe condition of the windows, thereby enhancing the likelihood of a foreseeable criminal attack. These allegations, accepted as true, were sufficient to state a negligence cause of action against defendants.

Defendants would have this Court believe that because the basement window through which plaintiff's assailant entered the apartment was not part of a common area and was under plaintiff's exclusive control within the leased premises, it owed no duty to plaintiff. Judge White and I find this position to be untenable.[1] A landlord is liable for "injuries incurred by another even though the landlord has given up complete control, possession and use of the premises where . . . at the time the premises is transferred to the tenant a hidden dangerous condition exists, the landlord knows or should have known of the condition, and fails to apprise the tenant of it. . . ." *McCurtis v Detroit Hilton*, 68 Mich App 253, 256; 242 NW2d 541 (1976). In light of the testimony that defendants had received complaints, defendants' employees advised tenants to take additional precautions in securing their basement windows, and the nature of the defect at issue, Judge White and I find that plaintiff sufficiently pleaded facts to establish defendants' duty to her.

Furthermore, defendants assert that plaintiff failed to allege a proximate cause link between the unsafe or faulty basement window and the attack because the intruder broke the glass to enter the apartment, and he would have entered regardless of the window's condition. Judge White and I disagree. Plaintiff alleged that defendants breached their duty to warn or notify its tenants regarding the unsecured condition of the basement windows, which plaintiff alleges defendants knew existed in the 1970s and continued to exist in 1992 at the time of plaintiff's assault. As a result, plaintiff did not know that she should reinforce the window or take precautions to prevent intruders from entering her apartment through the basement window.

We find that plaintiff alleged sufficient factual and legal causation between these events and plaintiff's assault to withstand summary disposition. See, generally, *Ridley v Collins*, 231 Mich App 381, 388-389; 590 NW2d 69 (1998). The question of proximate causation was, therefore, properly submitted to the jury. *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995). Because genuine issues of material fact for trial existed and plaintiff's complaint stated a negligence claim upon

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[1] If an outer brick wall of plaintiff's apartment developed a hole through no fault of plaintiff, would defendant deny responsibility for fixing it merely by arguing that it was part of the leased premises, not a common area, and no longer under defendants' control? We think not.

which relief could be granted, the trial court properly denied defendant's motion for summary disposition under MCR 2.116(C)(8) and (10).

II

Next, defendants argue that the trial court erred in several of its evidentiary rulings at trial. The decision whether to admit or exclude evidence is within the trial court's discretion. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 614; 600 NW2d 66 1999. This Court will find an abuse of discretion only when an unprejudiced person considering the facts on which the trial court acted would say there was no justification or excuse for the ruling. *Cleary v The Turning Point*, 203 Mich App 208, 210; 512 NW2d 9 (1994).

A

Defendants claim that the trial court erred when it permitted two witnesses to testify about certain statements that defendants' maintenance personnel made to them regarding whether and how to brace the basement windows. I disagree. Richard Witte, an advisor to the Danbury Park Manor (DPM) maintenance employees in the early 1970s, testified that he saw drawings of a wooden security device in the maintenance office and saw a tenant bring the drawing to the office. Maintenance employees told Witte that they were instructed to hand the drawing to anyone who complained about being unable to secure their basement windows because maintenance was not permitted to build the wooden window brace but the tenants could do it themselves. William Diesenroth, a twenty-year resident of DPM, also testified that he spoke to maintenance after his apartment was broken into and was told to consider securing his basement windows with a wood bracing system because they were not properly or adequately secured.

Under MRE 801(d)(2)(D), admissions by a party opponent are not hearsay. Witte's and Diesenroth's testimony constituted statements offered against a party and involve statements "by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . ." MRE 801(d)(2)(D). Therefore, the statements were admissible as admissions by a party opponent under MRE 801(d)(2)(D).[2] Further, the statements were relevant to show defendants' notice regarding the unsafe condition of the basement windows, which was a disputed issue in the case.

Defendants' argue without citation to authority that the testimony should have been excluded because it is too old, i.e., it dates too far back in time from the incident at bar. Given that there was no testimony to contradict the conclusion that the same basement windows that existed in the 1970s were still in place in the 1990s, I am unpersuaded that the evidence is out-of-date or irrelevant.

[2] Although defendants argue that these maintenance employees were not employed by the DPM that is a party to this litigation, the testimony at trial established that a continuing general partnership known as DPM existed since the 1970s. We are therefore unpersuaded by defendants' assertions that it cannot be held bound by those "old" employees' statements to Witte and Diesenroth.

B

I also find that the trial court did not abuse its discretion when it permitted testimony regarding housekeeping problems such as broken refrigerators, leaking pipes, rotted out floors, and testimony about the formation of a tenants' association formed in response to tenant concerns about poor maintenance. The testimony was relevant to plaintiff's allegations of failure to maintain the premises, and its probative value was not substantially outweighed by the danger of unfair prejudice. MRE 401, 403.

C

Additionally, I conclude that the trial court did not abuse its discretion when it admitted records from the Department of Housing and Urban Development (HUD) citing defendants for poor maintenance and security at DPM. Defendants objected to the admission of these records on the basis that Diesenroth could not affirm that these were the same reports HUD provided to the tenants' association.[3] Defendants also objected on the basis of relevance to the testimony of Catherine Murphy, executive vice president of Associated Management, the management company that runs DPM, regarding the HUD physical condition inspection reports and DPM's ratings of "unsatisfactory" and "below average" on maintenance and security due to the "physical condition of the property." I find no abuse of discretion. The court found that Diesenroth adequately identified the HUD records and agreed that the documents were relevant to the issue of notice.[4]

Moreover, even if plaintiff submitted the HUD reports to establish the truth of their contents, I believe that the reports could be properly admitted under the public records exception to the hearsay rule, MRE 803(8). *Solomon v Shuell*, 435 Mich 104, 129-131; 457 NW2d 669 (1990).[5]

D

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[3] When counsel asked that "it be stricken because he can't say . . . positively that that was one of the documents he received," the court asked for clarification on what "it" meant and counsel said Diesenroth's testimony. The court overruled the objection. Counsel also subsequently objected that he had not seen the HUD documents, but after plaintiff's counsel informed the court that these documents were given to defendants per the scheduling order, the court also overruled this objection.

[4] Notably, in responding to defendants' motion for a mistrial, plaintiff argued that because defense counsel's opening statement put into issue the question of how well the DPM property was maintained, the HUD reports and complaints were properly admitted into evidence.

[5] I also find defendants' reliance on *Swartz v Dow Chemical Co*, 414 Mich 433, 445; 326 NW2d 804 (1982), misplaced, because the case is factually distinguishable. See *Clark v Seagrave Fire Apparatus, Inc*, 170 Mich App 147, 156; 427 NW2d 913 (1988) ("evidence of MIOSHA citations issued to a nonparty employer are not admissible as substantive evidence in a wrongful death action against the manufacturer where the violations are not the gravamen of the claim").

I further find no abuse of discretion in the trial court's ruling to permit a lay witness to provide an opinion based upon his observations of the inadequacy of early HUD inspections and other maintenance matters. Specifically, Diesenroth testified that until the tenants' association contacted HUD about their concerns, HUD had been "extremely lax and had made inadequate inspections." Subsequently, the tenants' association successfully convinced HUD to make more thorough inspections that apparently resulted in the withholding of HUD funds until repairs were made. The testimony was admissible pursuant to MRE 701 as any witness is qualified to testify regarding his physical observations and opinions formed as a result of them. *Lamson v Martin (After Remand)*, 216 Mich App 452, 459; 549 NW2d 878 (1996).

III

Next, Judge White and I agree that the trial court did not err when it sustained plaintiff's objections to defendants' voir dire examination of plaintiff's expert witness. The trial court properly ruled that defense counsel's questions which inquired into the existence of standards and the expert's recommendations for basement windows did not pertain to the witness' qualifications to testify as an expert. MRE 702.[6] Indeed, defendants' questions did not address Dr. Harris' scientific, technical or other specialized knowledge or help the court determine whether he was qualified as an expert by his knowledge, skill, experience, training, or education. Furthermore, the trial court did not abuse its discretion in ruling that the witness, based upon his knowledge and experience in security, was qualified to testify as an expert regarding a comparison of two windows from a security perspective. The expert was qualified in the field of security, the testimony served to give the jury a better understanding of the evidence or assist the trier of fact in determining a fact in issue, and the evidence was from a recognized discipline. MRE 702; see *People v Parcha*, 227 Mich App 236, 239-240; 575 NW2d 316 (1997).

IV

The trial court also did not abuse its discretion when it prohibited defendants from introducing into evidence plaintiff's boyfriend's criminal record or evidence of illegal drugs found within plaintiff's premises. The evidence was not materially relevant to a matter in issue, and the probative value of the evidence, if any, would be substantially outweighed by the danger of unfair prejudice. MRE 403. See, e.g., *Gainey v Sieloff (On Remand)*, 163 Mich App 538, 548-550; 415 NW2d 268 (1987). Additionally, the trial court did not err in refusing defendants' request to make a separate record on this issue, inasmuch as the existing record was sufficient to preserve the issue for appellate review.

[6] MRE 702 provides, "[i]f the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

V

Next, Judge White and I find that the trial court did not abuse its discretion when it prohibited Catherine Murphy from testifying that a township building inspector allegedly informed her that defendant should not barricade their tenants' basement windows at DPM. Defendants claim that the statements were admissible under MRE 803(1) as a present sense impression and under MRE 801 as the res gestae exception to the hearsay rule. They failed to establish, however, that the statements were made while the declarant was perceiving an event or condition or immediately thereafter. See *Johnson v White*, 430 Mich 47, 55-56; 420 NW2d 87 (1988); *Berryman v K Mart Corp*, 193 Mich App 88, 100; 483 NW2d 642 (1992). Even assuming that the court erred in not admitting this testimony, we believe that the error would be harmless in light of the other evidence presented at trial. See MCR 2.613(A).

VI

Also, the trial court did not err in admitting testimony regarding the replacement basement window that defendants installed after the attack because it was admitted to rebut defendants' insinuations that (1) the safety measures were not feasible; (2) they had no notice of the allegedly dangerous condition; and (3) they did not "control" the basement windows. See McCormick, Evidence (2d ed) § 275, p 667. Defendant argues that this testimony regarding subsequent remedial measures violated MRE 407, which states that:

> When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The purpose of MRE 407 is to encourage or not discourage people from taking steps to further the interests of safety. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 189; 600 NW2d 129 (1999).

Indeed, defendants' installation of a new window and a wooden brace against the basement window that would prevent anyone from entering the apartment through that window after the accident could be viewed as a subsequent remedial measure. The trial court cured any potential error in admitting this evidence, however, by admitting it for the limited purpose of establishing notice and by

instructing the jury that "[w]henever any evidence was admitted or received for a limited purpose, you must not consider it for any other purpose."[7]

Moreover, plaintiff established that before her assault, a number of other apartment owners had the same wooden brace barricading their basement windows, and she argued that this evidence was relevant to defendants' notice that the windows were unsafe without the barricade. We agree. This is not a situation where, as a result of plaintiff's assault, defendants implemented new safety measures. Rather, this safety precaution existed as far back as the 1970s and was implemented in some apartments before plaintiff's assault. Accordingly, there was no abuse of discretion in the admission of this evidence.

VII

Finally, the trial court did not abuse its discretion when it denied defendants' request to give a special jury instruction. The instruction did not accurately state the law relative to the applicable facts and circumstances of this case.[8] MCR 2.516(D)(4); *Chmielewski v Xermac, Inc*, 216 Mich App 707, 713-714; 550 NW2d 797 (1996), aff'd 457 Mich 593; 580 NW2d 817 (1998). See and compare *McCurtis, supra* at 256, with *Stanley, supra* at 148-151, and *Aisner v Lafayette Towers*, 129 Mich App 642, 645; 341 NW2d 852 (1983).

I would affirm in all respects.

/s/ Jane E. Markey

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[7] Specifically, the trial court made the following observation in denying defendants' motion for a mistrial based upon the alleged subsequent remedial measures evidence:

> I admitted the evidence of remedial measures in this case in light of the Defendants' assertion that the installation of these window devices was neither feasible nor proper nor allowed by the Defendant. In the face of that assertion, the fact that these devices were installed by Defendants' maintenance personnel, makes that evidence relevant and admissible.

The court also made reference to *Carreras v Honeggers*, 68 Mich App 716; 244 NW2d 10 (1976).

[8] Defendants' proposed jury instruction read as follows:

> Generally, where a premises is leased to a tenant, the lease is considered as equivalent to the sale of the premises for the leased term. The tenant is said to be the owner of the premises and as such is subject to all of the responsibilities of one in possession. As the result, a landlord who gives up control, possession and use of the premises does not have a duty to maintain he premises in a reasonably safe condition and is not liable to persons injured on the premises.

As authority for this special instruction, defendants cited *McCurtis, supra* at 255-256, and *Whinnen v 231 Corp*, 49 Mich App 371, 375; 212 NW2d 297 (1973).